

CAREGIVER BACKGROUND CHECK PILOT QUESTIONS AND ANSWERS

E. Fitness Determination

- E1. What is a fitness determination? For the purposes of the Background Check Pilot, a fitness determination is the review of the background check results (i.e., available registries and other databases, state and national criminal history search), and the decision as to whether a prospective hire is eligible to work as a newly hired caregiver of a long-term care facility or provider, based on the absence of any disqualifying information, as determined by the state.
- E2. Who makes the fitness determination? The fitness determination may be made by the long-term care facility or provider.
- E3. What criteria should be used to make the fitness determination? Section 307 of the MMA stipulates that a long-term care facility or provider may not knowingly employ any newly hired caregiver who has any "disqualifying information."
- "Disqualifying information" is defined as a conviction for a relevant crime or a finding of patient or resident abuse. The term "conviction for a relevant crime" means any Federal or State criminal conviction for any offense described in section 1128(a) of the Social Security Act (42 U.S.C. 1320a-7). The disqualifying offenses, as required under section 307 of the MMA include the following:
- **Conviction of program-related crimes**
Any individual or entity that as been convicted or a criminal offense related to the delivery of an item or service under title XVIII [42 USCS § 1395 et. seq] or under any State health care program.
 - **Conviction relating to patient abuse**
Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.
 - **Felony conviction related to health care fraud**
Any individual or entity that has been convicted for an offense which occurred after the date of the enactment (August 21, 1996) of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

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- **Felony conviction related to controlled substance**

Any individual or entity that has been convicted for an offense which occurred after the date of the enactment (August 21, 1996) of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

- **Finding of patient or resident abuse**

Any substantiated finding by a State agency under section 1819(g)(1)(C) or 1919(g)(1)(C) of the Social Security Act (42 U.S.C. 1395i-3(g)(1)(C), 1396r(g)(1)(C)) or a Federal agency that a newly hired caregiver has committed (A) an act of patient or resident abuse or neglect or a misappropriation of patient or resident property; and (B) such other types of offenses as a participating State may specify for purposes of conducting the pilot program in such State.

In addition, Wisconsin's Caregiver Law requires that employers deny employment to individuals who have convictions or findings included on the Offense List (HFS 12, Appendix A).

E4. What are the actual federal conviction citations for the crimes described under the Federal Exclusion List - section 1128(a) of the Social Security Act (42 U.S.C. 1320a-7)?

The federal list of convictions described under section 1128(a) of the Social Security Act (42 U.S.C. 1320a-7 applies to the Office of Inspector General (OIG) Exclusion List, which prohibits all Medicare/Medicaid-certified providers and other plans and programs providing health benefits funded directly or indirectly by the United States, from employing an individual with a conviction included on this list. It is not possible to provide an exhaustive list of applicable federal convictions. The statute applies to any federal or state crime that potentially relates to the listed categories. It is necessary to review the facts of each crime and consider whether it potentially relates to:

- Health care fraud
- Patient abuse and neglect
- Controlled substance (other than possession)
- Obstruction of justice

For example, a pharmacist is convicted due to removing drugs from their original packaging and re-packages them with a false expiration date, which is a crime against the FDA Act and is considered health care fraud.

If you would like to more information, or would like to discuss a specific conviction to determine whether it should be considered a disqualifying offense (especially as it relates to

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mandatory or permissive exclusions), you may contact Robin Schneider, OIG Attorney, at 202-205-0565.

E5. What does “conviction for a relevant crime” mean?

This means any Federal or state criminal conviction for any offense described in section 1128(a) of the Social Security Act (42 U.S.C. 1320a- 7) (see E3 above); and other such types of offenses a participating State may specify for purposes of conducting the pilot program in that state.

The offenses described in section 1128(a) of the Social Security Act are convictions for criminal offenses related to the delivery of an item or service under the Medicare program or any state health care program (e.g., Medicaid), convictions related to patient abuse, felony convictions relating to health care fraud and felony convictions relating to controlled substances.

In Wisconsin, convictions for certain crimes listed in s.50.065, stats also bar employment of caregivers under the federal pilot. The Offense List is available as Appendix III in the Caregiver Program Manual.

E6. What is the definition of “conviction?”

A conviction is the final legal judgment entered after a finding of guilt. Each state should determine what constitutes a conviction for the purpose of this pilot (including the effect of post-conviction relief), in accordance with state law.

E7. What is a “substantiated finding?”

A substantiated finding is the final decision by a governmental agency. After completing an investigation, a governmental agency makes a decision whether an allegation, based on the preponderance of evidence, did in fact, occur. If so, the allegation results in a “substantiated finding.” Due process is generally provided to the accused in the form of a fair hearing. Examples of substantiated findings by governmental agencies include adult abuse and/or neglect, child abuse and/or neglect, public assistance fraud, etc.

Refer to the Wisconsin Caregiver Misconduct Registry for the list of individuals with substantiated findings.

E8. What is a Rap Sheet?

An FBI Identification Record, often referred to as a Criminal History Record or Rap Sheet, is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests. The Identification Record includes the name of the agency that submitted the fingerprints to the FBI, the date of arrest, the arrest charge, and the disposition of the arrest, if known to the FBI. All arrest data included in an Identification Record is obtained from fingerprint submissions, disposition reports and other reports submitted by

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agencies having criminal justice responsibilities.

Dispositions include adjudications that have been modified or dropped and the findings of a court. Dispositions are submitted by criminal justice agencies, which include State Identification Bureaus, arresting agencies (sheriff's offices, police departments, state police, correctional facilities) courts, and federal agencies (FBI, Drug Enforcement Agency, Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Marshals, Immigration and Naturalization Services).